

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

YOLANDA RENE TRAVIS, et al.,)	
Plaintiffs,)	
)	
vs.)	CIVIL NO. MJG-15-0235
)	
WALDEN UNIVERSITY, LLC., et al.,)	
Defendants.)	
_____)	

Friday, October 16, 2015
Courtroom 5C
Baltimore, Maryland

BEFORE: THE HONORABLE MARVIN J. GARBIS, JUDGE

MOTIONS HEARING

For the Plaintiffs:

Timothy Maloney, Esquire
James Shah, Esquire
Alexander Ricke, Esquire

For the Defendants:

Robert Brennen, Esquire
Kathleen Pontone, Esquire
Stephanie Baron, Esquire
Anthony Kraus, Esquire

Reported by:

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P R O C E E D I N G S

THE CLERK: The matter now pending before this Court is Civil Docket MJG-15-0235, Yolanda René Travis versus Walden, LLC, et al. The matter now comes before this Court for a motions hearing.

Counsel, please identify yourselves for the record.

MR. MALONEY: Good morning, Your Honor. Timothy Maloney for the plaintiffs.

MR. SHAH: Good morning, Your Honor. James Shah for the plaintiffs.

MR. RICKE: Good morning, Your Honor. Alex Ricke for the plaintiffs.

MR. BRENNEN: Good morning, Your Honor. Robert Brennen on behalf of the defendant, Walden University.

MS. PONTONE: Good morning, Judge Garbis. Kathy Pontone for Walden University.

MS. BARON: Good morning, Judge Garbis. Stephanie Baron on behalf of Walden University.

MR. KRAUS: Good morning. Anthony Kraus, also for Walden University.

THE COURT: Okay. Good morning. You may be seated. First of all, I'm happy to see here counsel that I know on both sides from other experiences.

But no patents, Mr. Brennen.

No wheelchairs, Ms. Pontone.

1 None of that other stuff, Mr. Maloney.

2 Naturally, I have read all the materials. And I think
3 it's extremely important in this case to try to get a measure
4 of realism here and by confronting what it is those people on
5 the other side actually say, not what we would like them to
6 have said, and to try to understand what this case is about.

7 I just want to start off with what this case is about.

8 First of all, Mr. Maloney, you are not suing on any
9 theory of negligence; is that correct?

10 **MR. MALONEY:** That's correct, Your Honor.

11 **THE COURT:** So why don't we spend an hour talking
12 about why you don't have a valid negligence case. It would
13 seem that that's -- there's no need to discuss it; right? If I
14 say "All claims for negligence are hereby dismissed," you
15 wouldn't care, Mr. Maloney; right?

16 **MR. MALONEY:** Wouldn't care.

17 **THE COURT:** All right. Fine.

18 Who's speaking for the defense?

19 **MR. BRENNEN:** I am, Your Honor.

20 **THE COURT:** All right.

21 **MR. BRENNEN:** Robert Brennen.

22 **THE COURT:** You understand all negligence claims are
23 dismissed; correct? Can you restrain yourself from attacking
24 the nonexistent negligence claims?

25 **MR. BRENNEN:** I will do my best, Your Honor.

1 **THE COURT:** Yes. I know it's hard.

2 All right. Secondly, what you say is -- and I'm
3 quoting: According to plaintiffs, Walden purposefully engages
4 in a systematic prolonging of the dissertation process in order
5 to collect more tuition from students.

6 While said by the defendants, Mr. Maloney, that's an
7 accurate statement, isn't it?

8 **MR. MALONEY:** It is.

9 **THE COURT:** Okay. All right.

10 Mr. Brennen, is -- are plaintiffs unable to have a
11 valid claim if, by some miracle, they could prove that Walden
12 engaged in that systematic prolonging of the dissertation
13 process?

14 **MR. BRENNEN:** Well, Your Honor, as I'm prepared to
15 discuss, there's woefully insufficient facts alleged to support
16 such an allegation.

17 **THE COURT:** We've progressed.

18 So the theory is not invalid. The allegations are
19 insufficient; is that right?

20 **MR. BRENNEN:** We would submit that the theory is
21 invalid and --

22 **THE COURT:** Well, let's go back to the same question
23 which I asked before.

24 We've finally got agreement that plaintiffs are
25 alleging a fraudulent scheme to delay and collect additional

1 tuition. That's a good summary, Mr. Maloney?

2 **MR. MALONEY:** It is.

3 **THE COURT:** All right. And you're saying if they
4 could prove that, they would not have a valid theory; that is,
5 your client could engage in a fraudulent scheme without having
6 any liability?

7 **MR. BRENNEN:** No, Your Honor, we're not saying that.
8 What we are saying is that if -- if there were such facts that
9 could be properly alleged, it wouldn't -- this Court would not
10 be the place for them to bring a complaint about that scheme
11 because --

12 **THE COURT:** Wait a minute. Let's try and analyze
13 this, because we've already wiped out the nonexistent
14 negligence claims.

15 So you're saying if there is a fraudulent scheme that
16 causes a student to pay excess tuition, that's wrong, but that
17 cannot be addressed in this Court; is that right?

18 **MR. BRENNEN:** That's correct, Your Honor.

19 **THE COURT:** Okay. Well, that's interesting.

20 I mean, assuming there's diversity or some other
21 federal jurisdiction, let us then just try to understand this.

22 So, again, I'm testing the legal theory to try to get
23 the focus on what's really at issue. It's not a question that
24 they didn't -- even if they adequately alleged the fraudulent
25 scheme, I'd throw them out because I don't want to hear it.

1 Okay. So a university has a -- gets somebody to pay
2 tuition in order to take a course on whatever -- whatever, a
3 computer literacy -- and then the student shows up and they
4 say, Well, we don't have such a course, but we're keeping your
5 tuition anyhow. And there's a scheme to do that. You're
6 saying that there's no recourse?

7 **MR. BRENNEN:** In the hypothetical that Your Honor just
8 described, I would -- there are cases and the Creighton -- the
9 Ross v. Creighton case is one of them where courts have found
10 an exception to the bar against claims that amount to
11 educational malpractice claims, whether pled as tort or
12 contract or statutory violation, in the instances where there
13 are facts alleged that a specific promise has been made by the
14 university and the university has utterly failed to comply with
15 that promise.

16 **THE COURT:** But your contention is that there's no
17 recourse if you're defrauded. And that is by -- let us try and
18 address this. A student is told that your paper has been
19 analyzed and it's no good, and you have to write it again and
20 pay another couple thousand dollars, again and again and again.
21 Not on the merits, but because the plaintiffs in that case
22 could prove the university had a consistent practice of, number
23 one, never really looking at the paper.

24 I'm not saying these are these facts. But no matter
25 what was submitted, it wasn't good enough because we'd have to

1 get additional tuition. You're saying, And the university
2 could do that without a lawsuit, without being sued?

3 **MR. BRENNEN:** A university that did that, Your Honor,
4 we would submit, wouldn't be in business very long because the
5 students could complain to the state offices of higher
6 education about such a practice, and they would likely lose
7 their licensure.

8 **THE COURT:** Well, that's true. But -- so they
9 couldn't sue and get their tuition back?

10 **MR. BRENNEN:** No.

11 **THE COURT:** Okay. All right. Well, perhaps we could
12 just start with that, Mr. Maloney, that the -- or, Mr. Shah, is
13 it? I mean, the defense position is -- and, again, remember,
14 I've now thrown out your negligence claims.

15 **MR. SHAH:** Correct.

16 **THE COURT:** So that -- and I hesitate to bring another
17 case, but it does sound to me like there's a certain analogy
18 here that the scheme is once you sign up -- again, I'm not
19 saying that you could prove this or even that you've alleged
20 this, but that once you sign up, no matter what you submit, the
21 practice is: It's no good; pay us more money. It's no good;
22 pay us more money.

23 And the defense theory is: Well, that's too bad; we
24 can keep your tuition.

25 Now, I must say, Mr. Brennen, that's a pretty shocking

1 position, but perhaps Mr. Shah can explain what it is you're
2 talking about.

3 **MR. BRENNEN:** Well, one point of clarification before
4 he begins is that I'm not saying that the student wouldn't have
5 a means of redress to get the tuition back. It just wouldn't
6 be in the Federal Court.

7 **THE COURT:** Well, why would that not be in
8 Federal Court if there were diversity?

9 **MR. BRENNEN:** Because it's not a cognizable claim
10 under the laws of any of the states that are implicated in this
11 case.

12 **THE COURT:** Well, then you're saying it could not be a
13 claim in any court. There's nothing federal about it.

14 **MR. BRENNEN:** You're absolutely right, Your Honor.
15 These are all state law claims. And all the courts in the
16 states that are implicated in this case have held that you --
17 that courts are not going to get involved in claims that
18 require the Court to decide, for example, using your example,
19 the -- whether or not a paper was academically sufficient or --

20 **THE COURT:** I see. You want to address something
21 that's not here, and that's really not productive, Mr. Brennan.

22 **MR. BRENNEN:** Okay.

23 **THE COURT:** What is not here is a claim saying my
24 paper was good enough.

25 What is here is a fraudulent scheme that said, no

1 matter what the quality of your paper, we're going to say it's
2 no good in order to increase tuition. It's a fraud claim, and
3 you're saying somehow your client is immune from a fraud claim.

4 If you say -- you can say that, but I'd love to see
5 something. But, you know, eventually I'll hear from Mr. Shah,
6 but that does seem to be extreme. That's your position?
7 You're immune from a fraud claim?

8 **MR. BRENNEN:** No, Your Honor.

9 **THE COURT:** Okay. In that case, let's move forward
10 because they say -- they've alleged a fraud claim; right,
11 Mr. Shah?

12 **MR. SHAH:** Absolutely, Your Honor. And the gravamen
13 of the allegations that are set forth by plaintiffs in the
14 Complaint focus on intentional conduct; knowing and intentional
15 conduct by the defendant, Walden University, to set up
16 roadblocks in every step of the process for the Doctoral
17 candidates and for the Master's candidates to intentionally
18 prolong that process to extract substantial additional tuition
19 from the students.

20 **THE COURT:** But let me see if I understand where we
21 are. We've finally gotten through to what the case is.

22 The question is not, We're immune from any fraud
23 claim; but that the plaintiffs haven't adequately alleged a
24 fraud claim; right, Mr. Brennen?

25 **MR. BRENNEN:** That's certainly correct, Your Honor.

1 **THE COURT:** Okay. That's fine. All right. Now,
2 that's helpful. Okay.

3 So, Mr. Shah, now having done that, let me ask the
4 subsidiary question: Where is -- what is the claimed recovery
5 on behalf of your clients or any one of them? Is it more than
6 "Give me back the tuition"?

7 **MR. SHAH:** No, Your Honor. Simply seeking refund on
8 the tuition paid to Walden University.

9 **THE COURT:** Is there some claim of -- and that's your
10 claim, although there may be under certain statutes a legal
11 fee?

12 **MR. SHAH:** Additional -- right, additional remedies
13 available, but --

14 **THE COURT:** Well, what would those additional remedies
15 be that you're looking -- I assume somewhere you talk about
16 you'd be looking for legal fees, although we're not anywhere
17 near there.

18 But what else is it that you're looking for?

19 **MR. SHAH:** Talk about in terms of change of practice
20 to ensure that current and future students, you know, don't
21 have these issues.

22 But fundamentally, what we're seeking here is redress
23 for the thousands of students who have paid tuition bill after
24 tuition bill in an effort to try to satisfy the five -- the
25 very specific five-step process that Walden University outlines

1 is necessary for students to adhere to when they're seeking
2 their dissertation or thesis processes.

3 And with re -- and I'll just go right to the heart of
4 Your Honor's question. It seems like negligence, at least for
5 the moment, is back off the table. And the Sanders case
6 explains -- Judge Connelly specifically explains why, in the
7 absence of a negligence claim, and in the face of fraud claims,
8 why the educational malpractice doctrine doesn't apply.

9 But here what we've alleged is that the university,
10 through faculty turnover, faculty unresponsiveness, and
11 difficulty in obtaining faculty involvement in the first
12 instance, through, at a minimum, those three steps, that they
13 have created these hurdles and roadblocks that make it
14 difficult, if not impossible, for the thesis and doctoral
15 process to be effectuated.

16 Now, Mr. Brennen continually says that our allegations
17 are woefully inadequate. Respectfully disagree.

18 With respect to the five-step process that's required
19 for both --

20 **THE COURT:** Let me just interrupt.

21 **MR. SHAH:** Sure.

22 **THE COURT:** First of all, nobody is going to be
23 prevented from putting on this record whatever they want to.
24 And I want to have the record and I go back and refer to it;
25 everything's here. So I don't mean to cut you off at all. I'm

1 just trying to get some clarity on something.

2 **MR. SHAH:** Sure.

3 **THE COURT:** But don't -- for both sides, don't
4 hesitate to say everything you want whenever -- before we're
5 finished.

6 You are not -- basically, I mean, we get down to what
7 you've actually said in the Complaint, but it is not a part of
8 your claim that there's anything wrong with the five-step
9 process. I mean, you're not saying it's -- this is a long
10 process; there should be four steps; there should be six steps.
11 You're not arguing that.

12 Secondly, you are presenting a case that's based upon
13 a deliberate, intentional fraud. And that would be defeated if
14 the defendants had made a good-faith effort for any of these
15 points; correct? If they were -- if they didn't do what you
16 said they did out of fraud, that may be a fact question.

17 But if what they did, it was out of negligence, that
18 wouldn't be good enough for you.

19 If they made a good-faith effort to have people answer
20 within 14 days, et cetera, and a jury found that it wasn't part
21 of the scheme, it wasn't part of the scheme to not require
22 faculty to meet -- you understand. Are they here on
23 intentional tort?

24 **MR. SHAH:** That's absolutely correct, Your Honor.

25 **THE COURT:** All right. Okay. Okay.

1 So what else? I mean, you want to point to things --
2 I don't know -- tell me what you want to say so they can
3 respond to the fact that you're not alleging what you say
4 you're alleging, which is a deliberate fraud.

5 **MR. SHAH:** Sure. The only thing I will say briefly on
6 that point is, again, when it comes to the allegations
7 regarding the types of impediments that were being faced by the
8 plaintiffs and the other members of the class, the issues
9 involving the faculty as it comes to responsiveness and
10 turnover and availability, those -- that is integral to every
11 step in the process that these students are required to go
12 through.

13 And so -- and not only do we allege that in terms of
14 more generally, but specifically with respect to each of the
15 plaintiff's own experiences and the example in the several-year
16 period of the plaintiffs having in two instances five separate
17 supervisory committee members, repeated examples of lack of
18 responsiveness and difficulty obtaining faculty review.

19 In addition, Paragraph 132 sets forth multiple
20 examples of complaints that mirror almost exactly the
21 complaints that the three named plaintiffs have had.

22 So --

23 **THE COURT:** Okay. Mr. Shah, let's -- it's terrible.
24 What they've done -- what they do is terrible, and you've
25 alleged a terribly run operation.

1 Where is the allegation that supports plausibly that
2 it was done with a fraudulent intent as compared to
3 incompetence or negligence? I mean, that's the essence.

4 Ultimately, you're going to have to prove that.
5 They're saying you didn't allege that.

6 **MR. SHAH:** Right. Well, obviously plausibility comes
7 from reading a Complaint in totality, the totality of the
8 circumstances.

9 And what we have here are, in addition, as I just
10 mentioned, the specific examples of the plaintiffs where they
11 are all encountering the same types of issues, the same types
12 of delays, the same types of difficulties, but we buttressed
13 that with the specific allegations of all of the -- of many of
14 their other classmates who have encountered precisely the same
15 experiences. And to put it in context --

16 **THE COURT:** Let me -- let's just go further.

17 **MR. SHAH:** Yes.

18 **THE COURT:** You've alleged that this -- they're doing
19 this and they're doing this for a lot of people, if not
20 everybody. But where is the allegation that would permit a
21 finding that it was done intentionally rather than due to a
22 negligence? Let me ask. Do you have any allegation about
23 faculty pay related to these activities?

24 **MR. SHAH:** There's no specific allegation with regard
25 to faculty pay, but we do have contextually allegations about

1 the business model of Walden itself, which tie in directly and
2 give further credence to the allegations of intentional
3 conduct. And those allegations include the rapid growth of
4 Walden; the fact that, unlike most, if not all, universities,
5 it spends more per student on marketing than it actually does
6 on instruction.

7 We also specifically allege that the --

8 **THE COURT:** Well, there isn't much instruction. It's,
9 as I understand it, the courses are canned. I mean, you know,
10 we're not attacking that. But the gripe of this complaint is
11 the supposedly individualized review of a particular student.

12 **MR. SHAH:** Well, that's true, although it speaks to
13 the model and where the focus is. And the other thing that is
14 alleged in the Complaint specifically is that about 80 percent
15 of the funds that Walden collects from the students come
16 directly from federal funding.

17 And also part of the reason why Walden engages in this
18 conduct with respect to its students in these two programs at
19 this stage is because these students are near the finish line;
20 and they have additional incentive to try to reach that finish
21 line, and Walden keeps moving that line.

22 **THE COURT:** You've mentioned federal funding, which
23 I'm not sure that's relevant to this case. Are you bringing a
24 qui tam action?

25 **MR. SHAH:** Well, we're not bringing a qui tam action,

1 Your Honor, but I think it puts in context what the motivation
2 is for intentional -- a type of intentional conduct that we've
3 described --

4 **THE COURT:** Motivation, a motivation would be fairly
5 obvious: to make money. I mean, so I'm not --

6 **MR. SHAH:** Certainly. Well, it is easier for them to
7 do that in the context of knowing that that money is coming
8 from federal funds as opposed to -- or at least a substantial
9 portion is coming from federal funds so the people will
10 continue to draw from that -- from that --

11 **THE COURT:** I don't see how that makes it more likely
12 fraudulent than not. I mean, the fact is the scheme, you say,
13 is to extract funds in order to have the student continue on
14 this quest for a degree.

15 I'm not sure how the federal funding makes it more
16 likely fraudulent. But do you have anything yet about, for
17 example, how many people actually get their degrees and what's
18 the percentages and things like that?

19 **MR. SHAH:** There's no specific allegation to that
20 effect in the Complaint, no, there's not.

21 **THE COURT:** All right. Okay. So where is -- to what
22 extent do we find an allegation that would be adequate to make
23 it a plausible fraud claim? And I know we have to talk about
24 some other theories. You have the contract and things like
25 that, but where would --

1 **MR. SHAH:** Well, I think, Your Honor, it's the
2 totality of the allegations with respect to the overall
3 conduct. And I think when we look, for example, in an omission
4 claim under not only the Maryland consumer protection statute
5 but the other alternative statutes --

6 **THE COURT:** Well, we're going to get to those. I
7 promise you we'll get to those. Right now I'm hearing your
8 fraud claims. Basically fraud, absolutely fraud, the thing --
9 we will certainly get to these Consumer Protection Acts,
10 contract, et cetera. I was just wondering if there was
11 anything else on that.

12 **MR. SHAH:** Well, I think just by way of example,
13 paragraph 229, Walden knowingly concealed, omitted, and
14 otherwise failed to state material facts about its Master's and
15 Doctoral education services that would tend to and did, in
16 fact, deceive students.

17 **THE COURT:** Okay.

18 **MR. SHAH:** And I think that the fraud, when it comes
19 to the consumer protection claims, is tethered to the standard
20 on omission pleading as well, which was . . .

21 **THE COURT:** Well, I see where you're going with this
22 allegation.

23 What's the -- what are these alleged statements?

24 **MR. SHAH:** I'm sorry, Your Honor? I missed that.

25 **THE COURT:** You say they made fraudulent -- failed to

1 state material facts.

2 **MR. SHAH:** Sure.

3 **THE COURT:** Which would be evidence of fraud.

4 Can I ask, where is that in the Amended Complaint?
5 Where are the specifics? I don't have the Amended Complaint.

6 **MR. SHAH:** So, for example, Paragraph 229, Your Honor,
7 Page 51 of 67.

8 **THE COURT:** I see. Yes. Thank you. 229. Okay.

9 Well, it's kind of a bootstrap thing. So they had
10 this fraudulent scheme, and then evidence of the fraudulent
11 scheme is they didn't reveal that it had a fraudulent scheme.
12 That's a little circular. I mean, what is it -- isn't it?

13 **MR. SHAH:** Well, I think that -- I understand Your
14 Honor's point. But when it comes to --

15 **THE COURT:** Well, I'm not arguing. I'm trying to --

16 **MR. SHAH:** Well, no. Let me answer it. When it comes
17 to omission-based pleading, as the Marshall case sets forth
18 under Maryland law and under the Maryland Consumer Protection
19 Statute, do not have to have the type of specific allegations
20 of fraud that you have to have or that are otherwise required
21 in a straight misrepresentation case.

22 So what we are primarily alleging on the consumer
23 protection claims is that --

24 **THE COURT:** I'm sorry. I'm sorry. If we're going
25 to -- if we're finished talking about your basic fraud and

1 we're going to consumer protection, we can do that. But that's
2 where we are. We're now on consumer protection?

3 **MR. SHAH:** Well, and maybe I'm not understanding Your
4 Honor's question specifically with respect to fraud. But the
5 claims that have been assert -- the plaintiffs don't assert a
6 common-law fraud claim.

7 **THE COURT:** All right.

8 **MR. SHAH:** The claims that are asserted are the state
9 consumer protection statute claim, the breach of contract, the
10 implied duty of good faith and fair dealing claim and then the
11 unjust enrichment claim.

12 **THE COURT:** All right.

13 **MR. SHAH:** So that's why I was referencing my comments
14 to your question about fraud in the context of what the
15 pleading standard is for an omission-based claim under the
16 Maryland consumer protection statute.

17 **THE COURT:** All right. I was speaking as if there
18 were a common-law fraud claim.

19 But you mentioned unjust enrichment, which gets me off
20 to a tangent. Isn't that an equitable claim that would not be
21 a jury question?

22 **MR. SHAH:** It is an equitable claim, but the case law
23 makes it clear that the equitable claim can be pled in the
24 alternative to breach of contract.

25 **THE COURT:** I'm not saying you can't. I'm just saying

1 that that one would be a nonjury claim, wouldn't it?

2 **MR. SHAH:** That's my understanding.

3 **THE COURT:** That's fine. All right.

4 Okay. Mr. Brennen, let's address the -- what we've
5 had so far, which is some expanding of the position that you
6 had a fraudulent claim. You had a fraudulent scheme which --
7 what do you want to say about that? Which I think we've now
8 agreed, well, if you had one, then they could get their tuition
9 back.

10 **MR. BRENNEN:** Well, Your Honor, there's not a lot to
11 say about the fraudulent scheme allegation because there's not
12 a lot alleged about it.

13 As Your Honor knows, there was an original Complaint
14 in this case filed in January. And then after we filed a
15 Motion to Dismiss, the First Amended Complaint that we're here
16 on today was filed in March.

17 Other than the addition of some specific facts with
18 respect to the newly added plaintiff, Ms. Goldbas, the only
19 other changes factually were the introduction of words like
20 "intentional" and "intentional scheme," which -- completely
21 devoid of any facts giving rise to or suggesting what it was
22 they discovered, because it was also supposed to be a concealed
23 scheme to delay intentionally.

24 And there's no allegation in the Amended Complaint as
25 to any of the specifics of the scheme or how in that period of

1 time between when they filed the Complaint based on the same
2 facts that didn't allege an intentional scheme, suddenly
3 there's an intentional scheme in the new complaint.

4 And the fact of the matter is, Your Honor, that there
5 aren't any facts to support that allegation.

6 The two cases or the case that counsel just referred
7 to, the Marshall case, we've dealt with this in our papers,
8 this idea that, well, because it's a nondisclosure consumer
9 fraud allegation, we don't have to have the specifics required
10 by 9B, and they refer to the Marshall case.

11 Well, in the Marshall case, there was, in fact, very
12 specific allegations and documents that were attached to the
13 Complaint referencing the allegedly false and fraudulent
14 statements, none of which is in this case.

15 This case is a lot like the case Murphy versus
16 Capella Education, which is a Fourth Circuit case from last
17 year, which also -- and the plaintiff in that case tried to
18 bring claims under, in that instance, the Virginia Consumer
19 Protection Act for failing to disclose facts about the
20 university's operation of a Ph.D. program in leadership.

21 And the Fourth Circuit in that case did hold the
22 plaintiff to the heightened pleading standards of 9(b) and
23 upheld the dismissal of those claims, which did include facts
24 like: They should have disclosed this material fact about the
25 graduation rate or other facts that they actually put in their

1 Complaint. But nonetheless, the Fourth Circuit found that that
2 was not sufficient to plausibly plead a claim under the act.

3 Ultimately, Your Honor, the naked conclusory
4 allegation of a scheme here is just like the allegation of a
5 conspiracy that was made in the Vollmar versus O.C. Seacrets
6 case that Your Honor dismissed. And it's very much like the
7 allegation of an antitrust conspiracy in the Twombly case and
8 the allegation of a policy to discriminate against certain
9 ethnic minorities in the Iqbal case by putting them in solitary
10 confinement.

11 In each of those instances, in Twombly and Iqbal, the
12 Supreme Court held that just saying "conspiracy" when the facts
13 you look -- the specific facts alleged could give rise to an
14 inference that is a completely proper activity going on or a
15 possibility of misconduct, that's not enough to plead a
16 plausible claim of fraud.

17 And I think Your Honor was hitting the nail on the
18 head when you asked the question if the facts that you've
19 alleged, the conduct that you've identified could just as
20 easily be the result of negligence, then -- as an intentional
21 scheme, then they haven't fulfilled their pleading obligations
22 in establishing sufficient facts to support a claim of
23 intentional scheme.

24 **THE COURT:** Well, in judging adequacy for
25 plausibility, do we take into account what a plaintiff could be

1 expected to know in a given context if this was a defective
2 product and you would expect that the plaintiff would know
3 exactly what the product was, would be able to point to
4 specific things that says that it's obvious that this was done
5 intentionally?

6 And here the plaintiff wouldn't have the ability
7 without some discovery to flesh this out, particularly to have
8 some indication of what is the way that Walden is operating.

9 Certainly it would be relevant to know if the -- how
10 the faculty is treated with regard to continuing or indeed to
11 know to some degree what's going on.

12 Is everybody put off? Are there ever any degrees
13 issued? Et cetera. I mean, wouldn't there be at least a
14 minimal discovery that would be --

15 **MR. BRENNEN:** Absolutely not, Your Honor.

16 **THE COURT:** Okay. So that you're not prepared to say,
17 Well, if there were discovery, you'd see that a reasonable
18 percentage of people don't have this problem? You're not
19 willing to say that?

20 **MR. BRENNEN:** They haven't even defined the problem.

21 **THE COURT:** Well, the problem is, as alleged, that --

22 **MR. BRENNEN:** Do people --

23 **THE COURT:** -- nobody is getting a reasonable
24 evaluation and, nobody is getting past the point where they
25 have to pay more tuition. That's the essential allegation.

1 That's what a scheme kind of means, is that nobody gets it.

2 So -- but --

3 **MR. BRENNEN:** Well --

4 **THE COURT:** And that a certain minimal amount of
5 discovery might very well determine the degree of plausibility.

6 **MR. BRENNEN:** Your Honor, that's exactly the kind of
7 thing that the Supreme Court says the courts are not going to
8 do; that, you know, in Iqbal, there were specific allegations
9 that Attorney General Ashcroft had implemented this policy in
10 the wake of 9/11 to put certain ethnic minorities and Muslims
11 into severe restricted solitary confinement.

12 The plaintiff in that case was able to allege that
13 that exactly happened to him, but the best he could do is to
14 say, They've got this policy, but he didn't have any facts to
15 support that.

16 But to use Your Honor's --

17 **THE COURT:** Well, it's a little more than that in this
18 Complaint. There's not only three plaintiffs, but there are --
19 admittedly, hearsay -- but at least references the fact that
20 some considerable number of other students are saying the same
21 thing happened to them, so it's not exactly just one plaintiff.

22 **MR. BRENNEN:** Well, Your Honor, two things: One, we'd
23 like to review with Your Honor the specific facts that are
24 alleged by these plaintiffs, and we -- because we believe they
25 don't support this general allegation --

1 **THE COURT:** Please do.

2 **MR. BRENNEN:** -- that you're describing now.

3 **THE COURT:** Please do so Mr. Shah can respond to it.

4 **MR. BRENNEN:** With regard to the attachment of alleged
5 postings by anonymous people on the Internet, selected
6 presumably with a view towards not putting on any comments that
7 were positive, that is pretty clearly not something the Court
8 could consider.

9 **THE COURT:** Well, one way you can respond to that is
10 in a memorandum. Maybe there are some positive postings; maybe
11 there aren't.

12 But, in any event, all I know is that a bunch of
13 people said these bad things. That doesn't mean that they're
14 right, but --

15 **MR. BRENNEN:** You don't even know that, Your Honor.
16 You know that somebody at a computer somewhere --

17 **THE COURT:** That's right.

18 **MR. BRENNEN:** -- wrote those things down.

19 **THE COURT:** Could have been a dog. Could have been a
20 dog.

21 **MR. BRENNEN:** It could have been one person.

22 **THE COURT:** Although I hesitate to use a dog example
23 because of the reports of dogs getting admitted to certain
24 online universities.

25 Nevertheless, I don't know if that's Walden or not,

1 but that doesn't matter.

2 Okay.

3 **MR. SHAH:** And, Your Honor, if I may, you know, I
4 think from plaintiff's perspective, we just reject the notion
5 that this -- these allegations sound in negligence as opposed
6 to sound in fraud and sound in tort. And we reject that
7 position.

8 **THE COURT:** Well, we've -- I think we've cleared that
9 up.

10 **MR. SHAH:** Yes. You know, just by way of example --

11 **THE COURT:** He's saying just 'cause you say this is an
12 intentional fraud, intentional scheme doesn't mean that you've
13 got enough pleadings to make it a plausible claim. That's what
14 he's --

15 **MR. SHAH:** Well, I understand we have a burden to make
16 a pleading plausible, and I think where we allege a school with
17 the business model and then specific plaintiffs who have
18 encountered the same type of issues as they try to navigate
19 this process --

20 **THE COURT:** What do you mean by "a business model"?
21 What -- why wouldn't a for-profit enterprise like this have a
22 business model that says, Let's get as much tuition as we can?
23 Where does -- what does that tell us?

24 **MR. SHAH:** Well, I'm not saying that in and of itself
25 that that is -- gives rise to a cause of action, but it does

1 provide context for the allegations regarding the intentional
2 scheme, a scheme which is geared towards generating substantial
3 amount of profit at the expense of the students.

4 And I think that it certainly, in the totality, is
5 fair to take into account the type of business model that
6 Walden University has as, say, perhaps the University of
7 Maryland in terms of the environment in which its students
8 operate to help put into context the allegations of fraudulent
9 intentional conduct. I don't think they can be separated.

10 **THE COURT:** What do you mean by a business model other
11 than to say, "We're going to offer this service, and we're
12 going to get tuition"? And, of course, inherent in it is the
13 fact that the more tuition we get the student to pay, the more
14 money we make. I mean, what's inherently wrong? What's wrong
15 with that?

16 **MR. SHAH:** Well, again, I think it's -- it is
17 contextual in terms of an -- allegations.

18 **THE COURT:** Okay.

19 **MR. SHAH:** It speaks to the incentive to not permit
20 timely completion of these processes.

21 **THE COURT:** Okay. Again, I want to talk about -- you
22 still have also a breach-of-contract theory; correct, Mr. Shah?

23 **MR. SHAH:** Correct, Your Honor.

24 **THE COURT:** All right. Let me just ask Mr. Brennen.

25 I mean, students pay tuition; correct?

1 **MR. BRENNEN:** Yes, they do, Your Honor.

2 **THE COURT:** Okay. So as a matter of contract law, you
3 owe them something. You owe them something more than to say,
4 Thank you for your tuition; go away. Right?

5 So tell me what it is that in the matter of -- what do
6 you owe a student who pays tuition?

7 **MR. BRENNEN:** They -- as Judge Davis recognized in the
8 Onawola case versus Johns Hopkins and the Maryland Court of
9 Special Appeals in the Harwood case, there's an implied
10 contract that if the student completes the requirements for a
11 degree, that the university will not arbitrarily or
12 capriciously refuse to bestow that degree. That's what they're
13 entitled to.

14 **THE COURT:** Absolutely. Absolutely. I don't think
15 there's any disagreement.

16 And bear in mind, the plaintiffs are saying that you
17 deliberately put an impediment so that the students couldn't do
18 what would entitle them to the degree. That's their
19 allegation.

20 **MR. BRENNEN:** That's their very conclusory allegation.

21 **THE COURT:** Well, that's it. Okay. Fine.

22 **MR. BRENNEN:** And if I might, Your Honor, just to
23 address --

24 **THE COURT:** But that's -- we got past a whole lot of
25 stuff. And we're now down -- that's the contract, Mr. Shah.

1 You agree that's the contract; right?

2 **MR. SHAH:** Yes, Your Honor.

3 **THE COURT:** Okay. Now, it says you haven't alleged
4 sufficiently, plausibly that the school put an impediment.
5 Okay? Now, that's different from a fraud claim. That's a
6 contract claim.

7 Okay. So now tell us how you've alleged or what
8 you've alleged to say they put in an impediment. Mr. Brennen
9 will respond to it. And we'll see whether what you've got is
10 plausible or not.

11 **MR. SHAH:** Sure, Your Honor. And just in terms of on
12 contract, it says a party to a contract should be prohibited
13 from acting in a manner as to prevent the other party from
14 performing his obligations under the contract.

15 **THE COURT:** Absolutely. I have no disagreement about
16 that.

17 **MR. SHAH:** That's exactly what we've alleged here.
18 The agreement was that we have these five steps that you need
19 to adhere to in order to get to the end of this process; and
20 what we've said is that through the manner in which Walden
21 deals with its faculty that it creates hurdle after hurdle to
22 make sure that these five steps cannot be completed in a timely
23 manner; and that it requires from a contractual standpoint.

24 **THE COURT:** I don't know what you mean by "in a timely
25 manner." I think you're making the allegation they can't be

1 completed at all.

2 **MR. SHAH:** Well, in large part, that's correct. And
3 certainly we've seen that from the plaintiffs in the other
4 examples in the Complaint.

5 But it is a failure to act -- for Walden to act in the
6 manner -- in a manner that is consistent with the contract.
7 They have an obligation to allow the students to work through
8 these steps and not create hurdles when it comes to faculty
9 responsiveness, faculty turnover, faculty availability that
10 makes it -- that prohibits students from working through those
11 steps.

12 **THE COURT:** Well, let's -- okay. I mean, that's a
13 little repetitious of what you've already said. But let's take
14 this. Let's take Plaintiff A, whoever Plaintiff A is. And
15 suppose the evidence is, if we get there, that Plaintiff A has
16 submitted a certain paper and the university said it's not good
17 enough. Okay? And you're saying that's part of the scheme,
18 et cetera.

19 Well, suppose it turns out, as a matter of fact, it's
20 a pretty terrible paper and that any competent faculty member
21 would say, This is garbage and is not acceptable. What does
22 that do for that plaintiff, Plaintiff A? It's -- actually,
23 she's not entitled to proceed. She would not be entitled to
24 proceed if she had the best possible faculty member. Where are
25 we with that plaintiff? Does that plaintiff then still have a

1 claim?

2 **MR. SHAH:** Well, I think that when it comes to breach
3 of contract on the whole, I think that if there are impediments
4 that are in place as a result of institutional policy, all
5 right, that those impediments are faced by not only the three
6 named plaintiffs, but by the members of the class.

7 **THE COURT:** We are far -- wait a minute. We are far
8 from talking about class right now.

9 In order to even think about class, we need a viable
10 lead plaintiff. So let's talk about a plaintiff. Where are
11 we, if, in fact, Student A, or every one of your -- to any one
12 of your people, all of your people --

13 **MR. SHAH:** Right.

14 **THE COURT:** -- they wouldn't have been allowed to
15 proceed by any competent faculty member.

16 Now, I recognize that we're getting into the area on
17 which we are not going to be debating from Plaintiff
18 affirmatively saying I was qualified and you unlawfully
19 rejected me.

20 This is a defense position. The defense position was:
21 Let's assume we had this scheme, and let's assume this and
22 let's assume that. If, in fact, the plaintiff wasn't entitled
23 to be allowed to proceed, she doesn't collect anything.

24 Now, what's wrong with that defense theory as an
25 affirmative defense?

1 **MR. SHAH:** Well, if we get into discovery and we get
2 into issues of summary judgment, certainly we would acknowledge
3 that Walden is entitled to its defenses.

4 But I think that it's very difficult for me to answer
5 that in the absence of having a full picture in terms of what
6 the --

7 **THE COURT:** But that answer has serious implications,
8 doesn't it?

9 **MR. SHAH:** Again, I think it's contextual. I think --

10 **THE COURT:** Well, I don't know that we're talking
11 about context at all. Give me -- let's make a very specific
12 contention that is the basis of your theory with regard to your
13 lead plaintiff, whoever it is. And he says, I submitted
14 Document A, Document B, and Document C; they were all turned
15 down because of this illegal scheme; right?

16 **MR. SHAH:** Yes.

17 **THE COURT:** That's what you're saying. All right.

18 The defendant says, as an affirmative defense, whether
19 it's in summary judgment or at trial, even if we had this
20 scheme and we were terrible and all that stuff, no reasonable
21 faculty member would have approved Document A, B, and C; and if
22 they -- if that is the fact, then this plaintiff would not be
23 able to recover; correct?

24 **MR. SHAH:** Well, subject to our ability to counter
25 that if we disagreed with that notion, then certainly they

1 would, I suspect, challenge the adequacy and typicality of that
2 plaintiff to represent the class.

3 **THE COURT:** Well, no. It's more significant than
4 that. This is an important question. Don't underestimate the
5 significance of this.

6 I can see Mr. Maloney looking at me, so he knows what
7 I'm talking about.

8 That plaintiff can't -- if it's a fact, that plaintiff
9 can't recover; correct?

10 **MR. MALONEY:** Your Honor, can I join in on this?

11 **THE COURT:** Mr. Maloney, you know, what is it they
12 say?

13 **MR. MALONEY:** I heard my name shouted out somewhere.

14 **THE COURT:** I wish -- Mr. Maloney, of course, please
15 participate. I was going to say something funny, only because
16 it's you. Of course, you can.

17 But let me --

18 **MR. MALONEY:** Your Honor, if it's a fairly debatable
19 question, of course, Walden can exercise its reasonable
20 discretion and say, This does not meet academic standards and
21 you don't pass. And that's not a plaintiff. That's not a --
22 that's not this case.

23 But if that were the issue here and it's simply a
24 question of academic discretion, we wouldn't be -- this would
25 not be a case.

1 The claims here are these people would submit papers
2 week after week after week, and no one would call -- they
3 didn't get any response.

4 And then, after months, the faculty member would be
5 gone and another one would come and they would be gone.

6 Looking at Zitter here, Zitter says that for six
7 years, she had been working day after day after day to get
8 responses from the faculty in this so-called 14-day deadline.
9 They have a 14-day turnaround deadline. She would go three or
10 four months. She goes through six, seven years without getting
11 very much response on this. And as a result -- and --

12 **THE COURT:** I'm having a different -- everything you
13 say is right, but I have a different concern here, big-picture
14 concern; and that is I don't think you're disagreeing. I don't
15 think it's incorrect to say that as far as -- if I name one of
16 these plaintiffs, then it would look like I'm picking on that
17 one, but that Plaintiff A, that a defense, perhaps an
18 affirmative defense by the school, would be the stuff that this
19 plaintiff submitted was inadequate, not even arguably
20 inadequate. It was inadequate. And if they established that,
21 there's no -- pleading stage and looking down the line, then
22 Plaintiff A can't recover tuition; right?

23 **MR. MALONEY:** Academic insufficiency is an absolute
24 affirmative defense. And unless they were arbitrary or
25 capricious about it, that's not going to be an issue in this

1 case.

2 **THE COURT:** Mr. Maloney, Mr. Maloney, let me -- yes,
3 and this takes me to this question, which is: How could we
4 ever certify a class when each individual plaintiff could be
5 vulnerable to an academic insufficiency defense?

6 **MR. SHAH:** Because every single plaintiff, Your Honor,
7 would be paying tuition -- if our allegations are proven to be
8 correct, would be stepping into a situation where the deck was
9 purposefully and intentionally stacked against them. And if
10 they had known those facts, if we were able to prove them, they
11 would have never paid a dime of tuition to Walden University in
12 the first place, whether they were an A-plus student or a
13 D-plus student.

14 **MR. MALONEY:** And the delays here are not associated
15 with the quality of their academic submissions.

16 **THE COURT:** I admit this is a class certification
17 issue.

18 **MR. MALONEY:** Yes.

19 **THE COURT:** But let me give you an example of a case
20 that I've been involved in that is a -- but I'll change the
21 facts, but it isn't going to change the facts significantly
22 because you know what's on the public record.

23 But let's assume there is a claim that a certain
24 hospital did unnecessary operations.

25 Yes, I see. Okay. And that --

1 **MR. MALONEY:** I'm feeling my stent right here
2 (indicating).

3 **THE COURT:** I see. All right. You're taking that
4 extra medication.

5 **MR. MALONEY:** Indeed.

6 **THE COURT:** All right. Patient goes to this hospital.
7 They do some tests on you. They send the test to some -- they
8 say they send the test to some laboratory. They say they get
9 back the results. And they say you need this operation, and
10 they give you the operation. And they do this to a lot of
11 people.

12 And then comes along and the patients sue, but no
13 patient can prove that they really didn't need the operation.
14 Where are we with that?

15 Now, admittedly in one example it was settled. But
16 where are you with that, Mr. Maloney, now that you know all the
17 facts?

18 **MR. MALONEY:** I think Dr. Maizel should have paid. I
19 mean, to deal with -- to deal with this situation right here,
20 that really is not where we're going to end up here. We're
21 going to end up here with a review process that didn't
22 function. There was an advertisement that you're going to hear
23 back and get feedback in 14 days. That was all part of the
24 marketing process.

25 **THE COURT:** Well, that's one example of -- that's

1 right. That's one example.

2 **MR. MALONEY:** But this was not -- if the allegations
3 were just, We have a disagreement about whether the paper about
4 Ulysses F. Grant is worthy of an F, a C, or an A, we wouldn't
5 be here. This is not focusing on arbitrary bad grades or
6 anything like this.

7 **THE COURT:** Oh, so you're back at the ab initio, the
8 first tuition.

9 **MR. SHAH:** The problem is at the inception; that's
10 exactly right, Your Honor. The problem is --

11 **THE COURT:** You're not talking about attacking the
12 extra tuition for the fourth paper. You're saying at the
13 beginning, at the threshold.

14 **MR. MALONEY:** From day one.

15 **MR. SHAH:** Setting foot into a process that is, if we
16 prove it, as described.

17 **THE COURT:** That even if your plaintiff was
18 academically insufficient, they would still be entitled to
19 recover because they were promised --

20 **MR. MALONEY:** Yes. Assume all of Walden's judgments,
21 academic judgments are 100 percent correct. We'd still be in
22 the same position, because the delays here were extraordinary.
23 The process they advertised, the 14-day turnaround process did
24 not exist because the faculty never complied with it. When
25 they -- and then the faculty turned over.

1 So these kids were in an endless -- students were in
2 an endless loop which would take five or six years just to earn
3 a few credits, 'cause no one would respond to their phone
4 calls. No one would review their papers. It's not that they
5 got bad grades. They didn't get any grades 'cause nobody would
6 review their papers in the first place.

7 We're not here to argue As versus Cs versus Fs.

8 **MR. SHAH:** It's the overall process.

9 **THE COURT:** All right. Well, you've clarified it.

10 Mr. Brennan, it's been clarified that the gripe is the
11 first tuition payment. So, I mean, we're not talking about the
12 fourth one. We're talking about the first one and then all
13 subsequent. All right. Okay. That's their claim.

14 **MR. BRENNEN:** Yeah. I'm almost at a loss to where to
15 begin to respond to --

16 **THE COURT:** Oh, at the beginning.

17 **MR. BRENNEN:** Well, that's good, because it appears
18 that Mr. Maloney and I are reading different copies of the
19 First Amended Complaint, because most of what he just referred
20 to specifically with respect to Plaintiff Zitter and certainly
21 with respect to the allegations are nowhere in this Complaint.

22 Just a couple of examples are we've heard twice about
23 an advertisement about a 14-day rule. That's not -- there's no
24 alleged advertisement in the First Amended Complaint; there
25 wasn't an alleged advertisement in the original Complaint.

1 And the allegation that the delays with respect to the
2 named plaintiffs in this case had nothing to do with academic
3 performance is completely inconsistent with the facts that --
4 the specific facts that are alleged.

5 And I'm happy that we could go through any one of the
6 plaintiffs. And you will find that there are issues where they
7 were -- their delay, as they would characterize it, was exactly
8 the result of a prospectus, for example, from -- with respect
9 to Plaintiff Travis, twice submitted a Prospectus and twice it
10 was rejected as insufficient.

11 And with respect to Plaintiff Travis, at least one of
12 those occasions after that, she took a leave of absence. She
13 voluntarily chose to take a leave of absence, causing a delay,
14 so that she could work on her prospectus while she was not
15 enrolled at Walden and not paying any tuition. So this notion
16 that the delays -- the alleged delays have nothing to do with
17 academics and all to do with the supposed --

18 **THE COURT:** Can we address what they're alleging and
19 not what you want them to allege. They're alleging that the
20 paid tuition and the process was fraudulent. Even if you
21 deserved delays, you were promised you would get an adequate
22 and timely review. That's what they're saying.

23 The fact that you didn't have adequate papers, the
24 fact that you yourself caused part of your delay doesn't
25 eliminate what they're complaining about. They are complaining

1 about, for lack of a better word, false advertising at the
2 beginning. You're not getting what you said you were promised;
3 that's all.

4 **MR. BRENNEN:** Well, I have to disagree, Your Honor.
5 They're not -- there is no complaint of false advertising in
6 any factual --

7 **THE COURT:** They are complaining about the -- if I'm
8 using the word "false advertising" as if there's an
9 advertisement alleged, which there isn't, although heaven only
10 knows they will add that to an Amended Complaint, which I don't
11 know has any great function here. You were promised what you
12 said, that if you complied with these provisions, you get a
13 degree; and that you put impediments in it, so that at the
14 beginning, you wrongly took their tuition. That's what they're
15 saying. Now, let's --

16 **MR. BRENNEN:** That's what they're saying. They just
17 haven't alleged any facts that -- from which anyone could infer
18 that such a scheme was in existence when they each enrolled
19 first in Walden.

20 I point out that one of the plaintiffs, Plaintiff
21 Travis, was enrolled in Walden's psychology Master's program
22 and completed it. There's no allegations about that in the
23 Amended Complaint, and she continued on from there to the Ph.D.

24 There's no -- there's simply no allegations to support
25 the intentional scheme. I'm not going to belabor that point.

1 But let's talk about this 14-day thing. I thought we
2 were up here -- at this juncture we're talking about the
3 breach-of-contract claim when Mr. Maloney has referred to this
4 14-day thing.

5 They mentioned the 14-day response deadline or rule in
6 their amended -- in their first complaint. They didn't say how
7 it was represented, how it was communicated to them as a
8 contractual promise. They just baldly asserted it.

9 And then we pointed out in our original Motion to
10 Dismiss that, well, they haven't alleged that, but maybe
11 they're referring to something in the student handbook which
12 speaks to a policy to have faculty respond to students within
13 14 days.

14 We pointed out in that Motion to Dismiss that, well,
15 the handbook also has the express disclaimer that says the
16 handbook does not create a contract. It also contains a
17 provision that says, We reserve the right to revise this. And
18 we also pointed out that the District of Oregon last year
19 specifically found, because of those provisions, the handbook
20 didn't create a contract.

21 So that's what we said in our Motion to Dismiss. And
22 then they, instead of responding to that, they filed their
23 Amended Complaint. And now they back away a little bit, but we
24 still hear about the 14-day thing. But they still don't allege
25 where and how this alleged contractual obligation was

1 communicated to them.

2 And interestingly, in their opposition to our Motion
3 to Dismiss, in order to suggest to the Court that, you know,
4 they don't want to interfere with the operations of the
5 university's academic programs in a way that would put them
6 afoul of the bar against claims for educational malpractice,
7 regardless of what theory they're brought under, they asserted
8 that they're not asking the Court -- they wouldn't be asking
9 the Court to enjoin or find that every time this 14-day rule
10 was violated was even a problem.

11 So if that's the case, how that could simultaneously
12 also be a contractual obligation is simply lost on
13 Walden University.

14 But, Your Honor, I think it would be helpful if we --
15 you know, we've had these timelines we've provided to counsel
16 and we provided to the Court in hard copy and we can put it up
17 on the screen. And we can review the actual progress of one of
18 these named plaintiffs and see whether they -- the allegations
19 that are actually in the First Amended Complaint bear out the
20 kind of things that are being said in this argument.

21 **THE COURT:** That's fine. That's fine.

22 **MR. BRENNEN:** I'm going to ask my colleague,
23 Ms. Pontone, to go through those timelines with Your Honor.

24 **THE COURT:** So we're looking at Travis.

25 **MS. PONTONE:** Yes, Your Honor.

1 **MR. MALONEY:** Your Honor, can I just make an
2 observation? We don't object to the Court hearing this to the
3 extent that the allegations here reference directly specific
4 paragraphs of the Complaint. This is a 12(b)(6) argument.

5 However, there are some statements that are made here.
6 We just got this this morning, about 8:15, from the other side.

7 **THE COURT:** You haven't responded yet in writing.

8 **MR. MALONEY:** And we're hoping to have something in
9 the next 20 minutes. But the -- I'll give the Court an
10 example. Where we're dealing with right in the middle, it
11 says -- dealing with Travis, it says [reading]: Resulting in
12 Walden refunding her tuition for this quarter.

13 Well, that's just a statement that has been added
14 here. That is nowhere in the Complaint.

15 In other words, these are facts outside of the
16 Complaint that the defense is trying to introduce improperly in
17 this 12(b)(6) proceeding.

18 So to the extent there are references to the
19 Complaint, fine. But to the extent there are statements in
20 here that are outside the four corners of the complaint, we
21 would object. And that's one of them.

22 **THE COURT:** I accept your objection and -- but let's
23 go through with what they want to point out, Mr. Maloney.

24 **MR. MALONEY:** Yes, Your Honor.

25 **MS. PONTONE:** Thank you, Your Honor.

1 **THE COURT:** We're looking at Travis.

2 **MS. PONTONE:** Your Honor, we would also point out that
3 this was in our original motion; and if plaintiff wanted to
4 respond to these things and say they were untrue. They could
5 have done that.

6 But, in any case, we will go through and just show you
7 exactly where in the Complaint it is supported.

8 The claim is basically that this process is fraught
9 with inefficiency and that Walden does not properly regulate
10 the turnover are the two things that you are going to be asked
11 to decide.

12 Ms. Travis in California begins pursuing her Ph.D. in
13 psychology at Walden in 2010. For approximately 18 months,
14 until 2012, she is taking the coursework. So when counsel
15 said, Oh, there's six or seven years, well, see, Your Honor, in
16 the beginning, they're doing courses, which they do just fine.
17 And despite the fact that they say there are delays throughout
18 their career, there is nothing alleged with respect to those
19 courses. And, in fact, they talk about how great they do in
20 them.

21 During that period when she is doing her coursework,
22 Ms. Travis asked Dr. Monica Sutton and Leslie Jackson to serve
23 as her dissertation committee in the future. She's not ready
24 to begin yet.

25 And she decides in the summer of 2012, yes, she's

1 ready to begin and she will be beginning. And then she
2 contacts Dr. Jackson, who says, Hey, I'm not now available.
3 It's 18 -- you know, a period of time has gone by, more than a
4 year; I'm not available right now to be your dissertation
5 chair.

6 So she gets Dr. Richard Cicchetti, about whom she
7 makes --

8 **THE COURT:** Slow down. Slow down.

9 **MS. PONTONE:** Okay. Thank you, Your Honor. I'm just
10 trying to speed it along because I've got a bit to say. I
11 don't want to bore you to tears.

12 But Ms. -- Dr. Cicchetti, who she does not in any way
13 complain about his timeliness, becomes her dissertation chair.
14 And so she begins the dissertation writing, which is all they
15 are complaining about, in September of 2012. She does the
16 coursework. She submits a prospectus to Dr. Sutton for review.

17 Dr. Sutton responds, and they're saying more than a
18 month. So it takes Dr. Sutton a few weeks after -- it depends.
19 In the Complaint they say 14 business days, 14 calendar days.
20 So she's either a week or two, quote/unquote, late on this
21 noncontractual 14-day.

22 And it goes along. She approves it. She submits her
23 prospectus to the program director, Dr. Raymond Trybus, to
24 review in January of 2013. So she's been writing for, you
25 know, a quarter and a bit. And Dr. Trybus rejects it.

1 Now, Your Honor, you need to understand what the
2 prospectus is. The prospectus is a full outline of the
3 dissertation, so it's going to describe what she's doing, what
4 her thesis is, et cetera. And Dr. Trybus rejects it. And,
5 again, it is -- you know, there's a period of, I think it's
6 20 -- I counted the days. 21 days is how long it takes, so
7 we're not talking about huge blocks of time.

8 She takes -- then what she does is she takes a leave
9 of absence, and that's denoted in red. And I really don't
10 think that -- in fact, the Complaint at 34 says they agree that
11 she takes a leave of absence.

12 **MR. BRENNEN:** 94.

13 **MS. PONTONE:** I'm sorry. 94. Although she's not
14 enrolled at this point, she submits her prospectus again to
15 Dr. Cicchetti. It's rewritten for review, and then Dr. Sutton
16 resigned. And when Dr. Sutton resigned, they put in Dr. Marc
17 Mooney. Dr. Marc Mooney is obtained and becomes the committee
18 member.

19 But during this period of time when there's a delay in
20 turnover, she's not enrolled at Walden at all. She did -- then
21 she comes back in June of 2013 for the summer quarter, and she
22 does have difficulty in getting responses from Dr. Mooney. And
23 this results in Walden refunding her tuition for that quarter.
24 She files an appeal. All the states that regulate Walden and
25 all of the licensures, the learning commissions require that

1 you have an internal process if students are dissatisfied. She
2 timely files an appeal, and Walden agrees that the amount of
3 time is inappropriate. They take 63 days. It's about --

4 **THE COURT:** Is that what you're objecting to,
5 Mr. Maloney?

6 **MR. MALONEY:** It is.

7 **MS. PONTONE:** And you object --

8 **MR. MALONEY:** Well, there's nothing in the Complaint
9 about that.

10 **THE COURT:** Is that in the Complaint?

11 **MR. MALONEY:** No.

12 **THE COURT:** The refund?

13 **MR. BRENNEN:** What's in the Complaint, Your Honor, is
14 that -- an allegation of how many quarters she was there and
15 how many she paid for. And if you look at the allegations
16 there, she's enrolled for more quarters than she paid for.
17 That's why. And we said that in our --

18 **THE COURT:** I don't think for present purposes whether
19 she got a refund or not makes any difference.

20 **MR. BRENNEN:** Thank you, Your Honor.

21 **MS. PONTONE:** Okay. Thank you, Your Honor.

22 So she enrolls again -- sorry.

23 Then she takes another leave, Your Honor. She's on
24 another leave of absence, and she submits her prospectus again
25 to Dr. Trybus.

1 **THE COURT:** I guess leave of absence means you're not
2 paying for something because it's not like you're --

3 **MS. PONTONE:** Yes, Your Honor, not paying. She's not
4 enrolled.

5 **THE COURT:** You're not there. The only thing is
6 you're just not paying.

7 **MS. PONTONE:** You're not paying. Although,
8 Your Honor, she's alleging, "I submitted things at that point."
9 Well, she's not enrolled, so she can't submit things. But
10 that's the kind of delay they're complaining about. She's not
11 enrolled, and she does get a new -- she gets somebody to
12 replace Dr. Mooney. Dr. Walters replaced Dr. Mooney.

13 Meanwhile, Dr. -- her chair is -- Cicchetti is there
14 the whole time. And her program director, Dr. Trybus, they're
15 not changing. It's not a, you know, completely shifting cast
16 of characters. This is the guy who is -- she submits it for
17 review, and it's not -- she's not responded to during the
18 period she's not enrolled.

19 But when December 2nd rolls again -- rolls around, she
20 reenrolls. Dr. Trybus immediately gets back to her and tells
21 her that it's rejected, and the comments are given. You know,
22 whenever they reject something, they say, Well, here are the
23 things you have to do. These are the things that must be --
24 must be changed.

25 So she then works diligently for three quarters, and

1 she does make progress. She works to improve the prospectus.
2 The Complaint says she submits her prospectus to the research
3 department. And her -- she submits it -- this is interesting,
4 on June 25th. By July 9th, her prospectus is approved, timely
5 approved, even though we've got a holiday. So, you know,
6 that's the 14 days.

7 And all the other places we've been through,
8 Your Honor, they haven't alleged these delays with the
9 exception of, of course, huge exception of Dr. Mooney and a
10 couple of days on some of these others.

11 She submits, then, her proposal. This is Step III of
12 the process, Your Honor. The proposal is actually writing the
13 first three chapters of the dissertation. So she's got to
14 write the bibliography. She's got to submit a summary. And
15 she also has to show what exactly she's going to do in the
16 study, what her sample's going to be, all those -- what kind of
17 questions are going to be asked, how it's going to be graded,
18 et cetera. So she's got to submit all that.

19 And so what she does is she submits the proposal and
20 requests the assignment of the URR, which is a university
21 research reviewer who reviews the research for substance. But
22 at that point the proposal's not approved. The URR doesn't
23 look at it until the proposal is actually approved.

24 And then again, goes on a leave of absence, her third
25 leave of absence at that period of time.

1 So in -- and that's all the Complaint talks about with
2 respect to Ms. Travis.

3 So basically to recap, she's been enrolled since --
4 from 2010 till November of 2014. 18 months of that has been
5 coursework. And she's had -- I think if you look at the green
6 on the chart, Your Honor, I guess three different people who
7 have held -- the second member of the -- of her committee and
8 Dr. Walters remains her -- remained her person for the rest of
9 the time, well, 2013. So that's Ms. Travis. That's her.

10 Next let's go to Ms. Zitter. Who is the second --

11 **THE COURT:** Well, before we leave Plaintiff Travis --

12 **MS. PONTONE:** Yep.

13 **THE COURT:** -- the proposition is that on the face of
14 the Complaint, she did not suffer any undue prolongation.

15 **MS. PONTONE:** Yes, Your Honor. I mean, if you look at
16 the general prolongation, it's more caused by her leaving in
17 the middle of the process. She's got to start -- you know,
18 she's got to come back and start all over again, and these
19 professors have to gear up to deal with her proposals.

20 So, yes, Your Honor, that's exactly what we're saying,
21 although, again, this analysis requires Your Honor to say, This
22 is fraught with inefficiencies. This is too long for a
23 university. It's too long to have it be 21 days rather than 14
24 days.

25 **THE COURT:** That's not what they're alleging.

1 **MS. PONTONE:** Well, that's --

2 **THE COURT:** That's not what they're alleging. I mean,
3 it would be great if that's what they were alleging. They're
4 alleging that this was all a sham and a scheme, all combined,
5 that there was not going to be -- I'll just call it any kind of
6 review other than what it takes to extract more money. That's
7 their allegation.

8 **MS. PONTONE:** But they don't -- there's no -- there's
9 no factual support for that.

10 **THE COURT:** Okay. That's fine.

11 **MS. PONTONE:** I mean, and that's --

12 **THE COURT:** Let's not --

13 **MS. PONTONE:** Okay. Well, let's go on to Ms. Zitter,
14 then.

15 Ms. Zitter lives in Illinois. She's also pursuing a
16 Ph.D. in psychology. It takes her three years to do her
17 dissertation coursework, so twice what it takes Ms. Travis.
18 And there's no complaint about that, however.

19 She has had seven advisors over the six years. And
20 only three of those six years counsel referred to she's
21 actually in the writing process, which is what they're
22 complaining about.

23 There are no promises alleged. The only specific
24 delay identifies Dr. Apsche, and there's no information at all
25 about where she is in the process.

1 We know -- she says everyone has had at least one
2 replacement, and they've been delayed at least once. But we
3 don't hear any specifics about how she was delayed or what she
4 was delayed on and whether the delay was academically
5 justified, et cetera.

6 She withdraws from Walden in February 2012. There's
7 no allegation that she made an internal complaint, and we don't
8 assert that there was one. There's no excuse for the delay in
9 how she discovered this scheme that she's now come back to the
10 Court with, and there are no facts whatsoever about a scheme.

11 And, in fact, what she's specifically saying is things
12 like they don't regulate that process enough, Your Honor.
13 That's the scheme. They don't -- they're not -- they're not
14 watching the turnover, they're not insisting that people reply
15 to me within 14 days.

16 **THE COURT:** Mr. Shah, unless you're objecting, let her
17 finish.

18 **MS. PONTONE:** Thank you, Your Honor.

19 And I should, by the way, say Ms. Travis -- the only
20 allegation they make as to Ms. Travis, anything said, is that
21 Ms. Travis says she was by some unnamed person at some unnamed
22 time, certainly not in the marketing, that you can do the
23 writing within 13 months if it's properly planned. That's all.
24 That's the only allegation.

25 And, again, Your Honor, this is after the Motion to

1 Dismiss. So they're on notice that we're looking for specific
2 statements that were made.

3 So Ms. Goldbas is newly added to the complaint. She's
4 the new plaintiff. She hails from New York. She is a lawyer.
5 And, Your Honor, Walden students generally are working adults,
6 and all these people are.

7 She's enrolled in 2010 in the Ph.D. in psychology.
8 She has Yells and Gil as her dissertation chair. She also, by
9 the way, takes three years like Ms. Travis -- I mean Zitter, as
10 opposed to Travis who takes -- who gets it done in 18 months.
11 Students are different. Students, for any number of reasons,
12 take different time for things.

13 So she takes three years. Dr. Perry is her program
14 chair. And at the prospectus stage, sorry, your program chair
15 who, again, remains constant, just like Travis, the program
16 chair isn't changing. She does have changes, which we note.
17 In April of 2014, Dr. Gil was replaced. But note what the
18 Complaint says, and this is Complaint at 126.

19 Dr. Leanne Stadtlander replaced Gil because of Gil's,
20 quote, complete ineffectiveness and the need for a different
21 type of methodologist.

22 It was Ms. Goldbas who got the change. She was
23 unhappy with the effectiveness of the professor and got him
24 changed. That's what the Complaint says.

25 Dr. Perry rejected the prospectus, and he's the

1 program chair. So it's submitted. It takes, again, about a
2 month, February 3rd to March 3rd, for that to be rejected. And
3 she takes a leave of absence again in 2015. So that's -- those
4 are the allegations.

5 She says she -- while they say she suffered numerous
6 unspecified delays for lack of responsiveness, they don't tell
7 us when they are or what happened or -- and so there's no basis
8 for the Court to say that wasn't justified based on what was
9 submitted or how long it would -- or how long it should take to
10 make these kinds of comments.

11 The only claim she makes -- and this is also
12 interesting in the way it's phrased, Your Honor. In the
13 Complaint she says -- it's a throwaway. She's now stalled in
14 the prospectus stage with no hope of completing the
15 dissertation within the 18-month period that was represented to
16 her. But there's no representation of who represented it,
17 when, what happened, which we do think is required in this
18 case, Your Honor. And remember this is the Complaint -- the
19 complainant that's added after the Motion to Dismiss.

20 So with that -- and then we have the -- well, is it 18
21 months? Is it -- Travis says it could be within 13 months. So
22 there is no representation, Your Honor, about any set period of
23 time that it would take to write a dissertation, nor could they
24 be. They all depend on students and how well they perform and
25 how fast they can do things and what's going on in their job,

1 et cetera.

2 So while they say at the opposition at 19, they take
3 no issue with the academic requirements that require these
4 reviews; in fact, when you go back to the actual words that
5 they've written in the Complaint, they're asking the Court to
6 say this is an inefficient process and they're not regulating
7 the faculty enough. That's what the Complaint says.

8 And that, Your Honor, I think Mr. Brennen will talk
9 about the educational malpractice. But those are the facts.
10 And the, you know, the other people that are on the Internet,
11 Your Honor, we think they're not bound by Rule 11. They're not
12 properly under consideration in the case.

13 **THE COURT:** Well, can Mr. Shah respond to that?

14 **MR. BRENNEN:** Sure.

15 **THE COURT:** Did you want to respond now, Mr. Shah?

16 **MR. SHAH:** Sure, Your Honor. Just briefly.

17 And not to go through point by point, 'cause obviously
18 we don't -- didn't prepare a rebuttal chart. But just, for
19 example, with respect to Plaintiff Zitter, I believe counsel
20 indicated that there were no specific allegations regarding her
21 issues.

22 Again, by way of example, Paragraph 105, for example,
23 between September and November 2011, Plaintiff Zitter requested
24 on three separate occasions that Dr. Jack Apsche, her
25 dissertation supervisor committee member at that time, review

1 her dissertation. In an e-mail response to Plaintiff Zitter,
2 Dr. Apsche stated, quote, You can expect to receive a response
3 when I read it. If that does not suffice, please consider me
4 withdrawn as your committee member, end quote.

5 Not only did he fail to respond within the 14-day
6 period; he simply never responded with feedback.

7 In addition -- Paragraph 106 [reading]: In addition,
8 Plaintiff Zitter was forced to seek new dissertation
9 supervisory committee chairs and members due to faculty
10 resignations, faculty dismissals, ineffectiveness, and
11 unresponsive -- unresponsiveness -- I'm sorry, unresponsiveness
12 of faculty on at least five separate occasions.

13 And with respect to the allegation that Ms. Goldbas
14 was taking issue with the academic side, in Paragraph 126, when
15 she was told that she had to change the basis of her
16 prospectus, she was required to find a new dissertation
17 supervisory committee member because she was required -- she
18 needed a different type of methodologist. So she wasn't saying
19 that the person was ineffective. She was being required to
20 make that change.

21 At base -- and I just want to go back to the nature of
22 our allegations which don't sound in negligence. In Ross
23 versus Creighton University, it says that these types of claims
24 can proceed where an objective assessment is being made as to
25 whether an institution made a good-faith effort to perform on

1 its promise.

2 And it's -- this goes back to our position that
3 whether you're looking at it from a breach of contract or
4 implied duty of good faith and fair dealing claim or looking at
5 it from a statutory consumer fraud claim based on omission, if
6 Plaintiffs are correct and if their experience has mirrored the
7 experiences of thousands of other students and we can prove our
8 allegations and prove the existence of this scheme, then that
9 speaks to each of the students' experiences at
10 Walden University from the get-go.

11 And, you know, for that reason, we believe that these
12 allegations are more than sufficient on the causes of action.
13 And it's not just the three named plaintiffs that are feeling
14 as though that this is not a mere negligent act on behalf of a
15 few people at Walden.

16 You know, again, Paragraph 132, one of the postings
17 [reading]: Do not waste your money. My Walden experience,
18 which is their motto has -- has been nothing but a massive
19 headache and a very expensive one. Committee members, academic
20 reviewers, IRB reviewers, and URR personnel have clearly been
21 schooled in the "stall as long as you can so we get more money"
22 department.

23 And that's exactly what the plaintiffs here are saying
24 as well.

25 **THE COURT:** I'm not exactly sure about what these

1 postings mean in the current context. If it's in the Complaint
2 to say that there have been postings that are negative about
3 Walden, okay, but we get into these -- I'm not sure -- you want
4 to say that everything that's said in these postings is a
5 specific allegation that you're making? No, I don't think you
6 want to do that.

7 **MR. SHAH:** Again, it goes to the totality of the
8 pleading and --

9 **THE COURT:** Well, you want to say that Walden must
10 have been on notice that there were these complaints; is that
11 what you're saying? I --

12 **MR. SHAH:** Am I saying -- well, most assuredly, Walden
13 was on notice that --

14 **THE COURT:** Most assuredly.

15 **MR. SHAH:** It was its scheme. So based on the
16 allegations, it was clearly on notice, Your Honor.

17 **THE COURT:** Well, in today's world, I don't know
18 whether this is a random sampling or this is cherry-picked or
19 lemon-picked or what-have-you. I'm not sure about that.

20 Okay. Why don't we give the reporter a ten-minute
21 break at this point and we'll reconvene.

22 (Recess taken.)

23 **THE COURT:** Okay. Let's see.

24 Mr. Brennen, were you going to respond to this or
25 Ms. Pontone?

1 **MR. BRENNEN:** I will respond to it, Your Honor.

2 **THE COURT:** Wait a minute. Mr. Shah, what are you
3 saying?

4 **MR. SHAH:** Your Honor, if I may, I know that I left
5 off; I had just mentioned two of the three plaintiffs in
6 response to the chart. With the Court's permission, I would
7 just like to mention one quick comment about Ms. Travis as
8 well, who is the first of the three plaintiffs.

9 And just by way of example -- and I know that her
10 experience was downplayed by counsel. But Paragraph 81, on
11 July 30th, 2013, a full 62 days after Plaintiff Travis
12 initially sent Dr. Mooney her prospectus, Dr. Mooney answered
13 Plaintiff Travis and apologized for not responding earlier,
14 writing [reading]: This is unacceptable. I really do
15 understand that time is money.

16 62 days is almost a full quarter with nothing
17 happening, with the tuition being collected certainly and kept
18 by Walden.

19 And I would just also add that, you know, the
20 allegations are not that there's just one Dr. Mooney, but that
21 the faculty is full of Dr. Mooneys as a result of this scheme.

22 And if the Court has any concern or any thought at all
23 that maybe these are just kind of three isolated individuals
24 who have stepped forward to serve as named plaintiffs, since
25 filing the First Amended Complaint, plaintiffs' counsel has

1 been contacted by well over a hundred students with similar
2 stories and similar concerns. And we would be happy to -- to
3 amend as well.

4 **THE COURT:** You can be very happy to, but that's not
5 proper. That's not proper. I mean, we want to start with
6 that, and you -- I don't even know where to begin to say you
7 don't want to be talking about attorney-client communications
8 with hundreds of people.

9 **MR. SHAH:** Well, no, no.

10 **THE COURT:** It's not in the Complaint.

11 **MR. SHAH:** I'm not making a proffer to those
12 communications, but I think what this points out is that even
13 just looking at the timeline for each of the three plaintiffs
14 that's been presented, that each timeline provides specific
15 examples of precisely the type of delay that we have alleged,
16 that the plaintiffs have alleged constitute the barriers to
17 completing the process.

18 **THE COURT:** But you're not alleging -- that's not your
19 complaint. Your complaint is we're induced to enter into this
20 agreement by virtue of the representation, which we'll get
21 into, that you would have an adequate review and an adequate
22 shot and you're not getting it. That's your allegation.

23 **MR. SHAH:** With respect to the contract, the
24 allegation is that --

25 **THE COURT:** With regard to your consumer protection

1 claims.

2 **MR. SHAH:** Well, with consumer protection claim, it is
3 predicated on the fact that Walden knew about the barriers that
4 it was erecting. And it didn't disclose to those people going
5 into these two programs to pay tuition, that it erected these
6 barriers, absolutely, yes.

7 **THE COURT:** Right. Whether a particular individual
8 had a one-day extension or a two-year extension doesn't matter.
9 They wouldn't -- or they had no extension on your theory.

10 **MR. SHAH:** It's all part of the larger scheme, that's
11 correct.

12 **THE COURT:** We'll come back to that.

13 Counsel, do you want to say something?

14 **MR. BRENNEN:** Yes, Your Honor.

15 First, I want to make it clear. I just want to make
16 sure counsel's representing to this Court that Ms. Travis paid
17 tuition for that summer quarter 2013 and Walden kept that money
18 and there was no refund. Is that the representation that's
19 being made to the Court?

20 **THE COURT:** Whatever is in the Complaint is in the
21 Complaint. I'm not -- I wouldn't put the burden on him to
22 remember that kind of detail. What difference does it make?

23 **MR. BRENNEN:** It makes a huge deal of difference,
24 Your Honor, if -- because we know that not to be the case,
25 whether it's in the Complaint or not. And I just want to be

1 clear whether it's being represented to the contrary.

2 **THE COURT:** Well, I don't -- I've got to tell you,
3 Mr. Brennen, that in terms of the adequacy of the Complaint,
4 that particular allegation that she paid or didn't pay the
5 extra quarter doesn't matter. Ultimately it will be
6 straightened out.

7 **MR. BRENNEN:** Your Honor, with that, I will get back
8 to what counsel was referring to before we broke. He
9 referenced the Ross versus Creighton case. As we discussed
10 earlier in the hearing, it's generally recognized, the implied
11 contract between the student and the university is that the
12 student completes the required coursework for degree; the
13 university will not arbitrarily or capriciously not bestow the
14 decree -- the degree that's been completed.

15 We all recognize that's not this case, because it's
16 admitted that, of course, that the plaintiffs here did not
17 complete the requirements for the Ph.D.

18 The Ross versus Creighton case reflects what has been
19 identified as a very narrow exception to the education
20 malpractice bar, barring claims --

21 **THE COURT:** Mr. Maloney, would you stand up and scream
22 that we're not talking about a negligence claim and we're not
23 talking about malpractice. Just scream, please.

24 **MR. MALONEY:** We're not here for educational
25 malpractice. No negligence.

1 **THE COURT:** Because --

2 **MR. MALONEY:** Was that loud enough, Your Honor.

3 **THE COURT:** It would not be good if I raised my voice.

4 **MR. MALONEY:** Thank you, Your Honor.

5 **THE COURT:** We're not concerned about a negligence
6 claim. We are not concerned about anything that is defended by
7 educational malpractice. We have an allegation that we've
8 talked about. I don't know what else to say.

9 **MR. BRENNEN:** Well, Your Honor -- and I'm not going to
10 belabor it because I don't want counsel to get hoarse yelling
11 on the Court's behalf. But we believe and it's in our papers
12 that these are claims -- they say they're not alleging the
13 educational malpractice; but essentially these are all just
14 repackaged educational malpractice claims. But that's the last
15 thing I'm going to say about it.

16 The Ross case, as I said, is a case that has this
17 niche claim where a student can show -- in addition to the
18 implied contract where you get a degree if you complete the
19 coursework, if a student can show specific promises by the
20 university to the student for specific things and the
21 university completely fails to provide what it's promised in
22 those specific promises, then he can pursue a
23 breach-of-contract claim.

24 In that case, Mr. Ross was a basketball player who was
25 recruited to Creighton. His prior academic performance in high

1 school was not, let's say, quite up to the rigor demanded by
2 Creighton's usual curriculum. And his allegation in that case
3 was that Creighton made a specific promise to him to provide
4 specific services, including tutoring and other help so that he
5 would succeed.

6 He alleged that those -- that the tutoring, et cetera,
7 was not provided at all; and, therefore, the Seventh Circuit
8 found that he had pled a claim.

9 We don't have any specific promises anywhere close to
10 what was found to be pursuable in Ross in this case.

11 We keep hearing about the context, and I'm not going
12 to bother with the Internet postings issue, because I think for
13 reasons we've already stated in our papers, they're not
14 something that the Court should or can --

15 **THE COURT:** I understand a complaint is that the
16 contract that we all agreed was raised, which is if you do what
17 you're supposed to academically, you'll get a degree. The
18 argument is the school put impediments in the plaintiffs'
19 performance. That's their argument. That's -- whether it's
20 good enough, bad enough on the facts and allegations, that's
21 their argument.

22 So they are not arguing about a specific course.
23 That's just where they are. I don't know what else to say
24 about it.

25 **MR. BRENNEN:** Well, Your Honor, in that sense, this

1 case is no different from the Onawola case where Judge Davis
2 found that -- again, Dr. Onawola was enrolled at
3 Johns Hopkins University trying to get a Ph.D. in epidemiology.
4 He was there in the program for 14 years, as compared to the
5 experiences of the plaintiffs here. And he sued JHU, claiming
6 that it had taken action to hinder -- intentional action to
7 hinder his progress in that Ph.D. program.

8 **THE COURT:** And he held that there was not adequate
9 proof of the hindering; right?

10 **MR. BRENNEN:** Well, and to get around the fact that
11 there wasn't -- well, what Judge Davis found, having reviewed
12 the actual facts of his progress, much as we've done with the
13 Plaintiffs Travis, Zitter, and Goldbas here, is that, quote,
14 The record plainly shows what common sense and common
15 experience teaches: that Dr. Onawola's experience at the
16 university, while not without its setbacks, was nothing outside
17 the usual experience of a doctoral student in a high-quality,
18 rigorous program.

19 Now, Dr. Onawola tried to get around that by saying,
20 Well, the reason they're hindering me, Judge Davis, is that --
21 because they're motivated by racial animus, that this is a
22 discrimination against Dr. Onawola, who was Nigerian. And
23 Judge Davis there said that's just a completely conclusory
24 allegation. I don't find any support in the Complaint, and
25 just as there's no support in the Complaint for this, existence

1 of this -- this alleged intentional scheme to delay students.

2 And the context that we keep hearing about is, well,
3 Walden is a for-profit institution and it collects tuition.

4 Well, that is no different than the argument that was
5 made and rejected by the Supreme Court in Twombly where the
6 plaintiff there alleged in an attempted antitrust conspiracy
7 class action that on the "Baby Bells" that had been created
8 after the breakup of AT&T were engaged in a conspiracy; and all
9 they could allege factually is, well, they were all engaged in
10 similar business practices, parallel business activities, which
11 were perfectly reasonable in their individual sense with
12 respect to each company. But that was the only fact that was
13 alleged and that it was a -- the conclusory allegation on top
14 of that, that it -- there's an antitrust conspiracy here.
15 Well, the Supreme Court said that's not good enough.

16 So just saying Walden University, which is an
17 accredited university -- it's been around for many years. It
18 provides valuable services to working adults seeking to get
19 degrees. The fact that they make money, that doesn't make --
20 the pure claim, "they're engaged in a scheme," that does not
21 make that a plausible claim.

22 **THE COURT:** All right. Thank you.

23 But getting back to what the case is, Mr. Shah, not
24 what it's not, one of the things that you're alleging is
25 that -- or you're contending, that there was an inducement.

1 There was, in other words, a false statement by omission that
2 induced people to enroll.

3 Now, there's an allusion in the argument to some
4 advertising. But where is there in the Complaint something
5 that has a factual basis for the contention, which could be
6 quite significant, that Walden communicated, by advertisement
7 or otherwise, to prospective students and said whatever the
8 heck they said?

9 **MR. SHAH:** Well -- and I take it Your Honor is talking
10 now about the consumer fraud claims with respect to the
11 inducement.

12 **THE COURT:** Well, it possibly does other things. But
13 I am saying that it would -- if there was an advertisement,
14 what did it -- no, I don't say the Complaint should say; what
15 does it say?

16 **MR. SHAH:** Okay. So two points on that. First, from
17 the omission-based claim, there doesn't need to be a specific
18 representation that we're relying on.

19 But I will say as to a specific representation, the
20 handbook goes on in great detail about the five-step process
21 that I've discussed with Your Honor --

22 **THE COURT:** The handbook is, as I understand it, not
23 provided to prospective students but to students.

24 **MR. SHAH:** I think every single person that begins the
25 dissertation or thesis process, every single student certainly

1 has an understanding what that process is and what that process
2 requires.

3 **THE COURT:** Let me repeat that in case we've missed
4 something. The Complaint doesn't say, nor does it leap out at
5 me as common sense, that somebody who is thinking about
6 enrolling is going to get the handbook. But certainly somebody
7 who's thinking about enrolling is going to presumably see an
8 advertisement or get some kind of communication from the
9 school. That's what I'm asking about.

10 **MR. SHAH:** I think implicit in the Complaint is that
11 someone starting this process, including the three named
12 plaintiffs, would have had an understanding as to what steps
13 they were required to take in the context of paying tuition to
14 Walden in order to complete the process.

15 **THE COURT:** I don't know what you mean by
16 "implicitly." There's no allegation of anything that was said.
17 Why is it so difficult for a Complaint to say they advertised
18 whatever the heck they said, 14 days or whatever the heck they
19 said? Why is it absent from the Complaint?

20 **MR. SHAH:** Well, I -- whether it's difficult or not, I
21 assume it would not be difficult to say that.

22 Plaintiffs' omission-based claims under the Maryland
23 Act and the California, Illinois, and New York Act, they're
24 fraud -- their fraudulent claims are predicated on Walden's
25 knowledge of its scheme and its failure to disclose that

1 scheme. That is actionable under all of the statutes,
2 independent of being affirmative misrepresentation.

3 **THE COURT:** Walden didn't say nothing to people. It
4 must have had something. It must have had a Web page. It must
5 have had something that said -- it's not in the Complaint. All
6 I'm asking is: If we're going to have something based upon "I
7 was falsely induced -- we/they were falsely induced to register
8 and start this process," where is the communication that we can
9 say, "Oh, but you didn't say this or you falsely said that"?

10 **MR. SHAH:** Understood. And beyond the handbook and
11 the representations about the process, the Complaint doesn't
12 speak to that further.

13 **THE COURT:** Okay. All right. What else do you want
14 to address? Well, we have waiver and limitations, but that's
15 really affirmative defenses. I don't see that -- that's not
16 going to knock it out at the Complaint stage.

17 **MR. SHAH:** And we submit the case law, and we agree
18 with Your Honor on that.

19 I know we touched on unjust enrichment earlier. If
20 Your Honor has any questions about that claim, I'd be happy to
21 answer them. Suffice to say that we believe on these -- on
22 this pleading, that we've alleged that a benefit was conferred;
23 that benefit was retained; and that it would be unjust to
24 retain that benefit. So . . .

25 **THE COURT:** Any further -- I would like talk to about

1 the class action allegations also while we're here, and then we
2 can meet with counsel and talk about where we're going.

3 In regard to everything we've discussed so far, does
4 defense want to say anything?

5 **MR. BRENNEN:** Just one thing in response to your last
6 exchange there, Your Honor, just to point out that we raised
7 the exact question that Your Honor just raised as to if there's
8 some representation out there, why isn't it in this Complaint?
9 We raised that in our Motion to Dismiss the original Complaint.
10 They've been on notice that we're going to be making these same
11 assertions; and yet three months later, they file a new one,
12 still nothing.

13 **THE COURT:** All right. One of the things is that this
14 is a tentative class action. And, of course, that requires, I
15 guess, at least one plaintiff to survive this missile.

16 But do you want to address that? The class action
17 would be -- what's the essence of the class action? That we
18 get something whereby we can have a class that is numerous
19 without undue individualized issues, et cetera? Do you want to
20 address that? It may be premature, but where is this heading?

21 **MR. SHAH:** Sure, Your Honor.

22 In terms of a road map -- and you're correct, assuming
23 that one or more of the plaintiffs' claims are permitted to
24 move forward. What we would then propose would be a discovery
25 schedule where we would take, you know, the standard discovery.

1 Following that period, we would move for class
2 certification under Rule 23 --

3 **THE COURT:** Yeah, I know.

4 **MR. SHAH:** -- inclusive of our expert reports. And
5 the scope and nature of that class would be determined by which
6 of the plaintiffs were permitted to move forward as well as
7 which laws we elected to move under.

8 But we would -- our intention would be to proffer
9 damages reports at class certification, which we would hope
10 would demonstrate to the Court why damages could be calculated
11 on a class-wide basis, assuming we were able to prevail on our
12 theory of liability.

13 **THE COURT:** Well, from what I understand -- and
14 jumping to the damage point and recognizing this would have to
15 be debated later in light of the actual Complaint, that your
16 claim was for a refund of tuition. That's what your claim is.

17 **MR. SHAH:** I think that the damages would be derived
18 from, right, tuition refund. Obviously, any damage model is
19 going to be guided in large part by what discovery
20 demonstrates. But certainly --

21 **THE COURT:** Well, that may be, but isn't each
22 plaintiff, if they prevail, a member of the class, entitled to
23 a refund of the tuition? Isn't that your claim?

24 **MR. SHAH:** Yes.

25 **THE COURT:** Not exactly something that would be

1 difficult for discovery. Okay.

2 And that would include all students, whether -- how
3 about a student who actually graduated and actually got --
4 isn't complaining about the timing?

5 **MR. SHAH:** Well, as to that issue, in any damage
6 model, there may be offsets based upon what is shown in
7 discovery.

8 And the cases, including the Cohen case out of the
9 Seventh Circuit, made clear that the certified class may
10 contain class members who hadn't been damaged. And under that
11 circumstance, that may very well be a situation where that
12 individual class member hasn't suffered damage, and that would
13 be accounted for in the damage modeling.

14 **THE COURT:** Well, I don't know what you mean by -- I
15 mean, I understand the words you're saying, but in this case --
16 so Class Plaintiff No. 37 just wouldn't recover. There would
17 be a claim process.

18 **MR. SHAH:** Well, they wouldn't recover in the amount
19 attributable -- and, again, recognizing that, I'm talking
20 without the benefit of an economist or the record.

21 But as a general matter, what I would say from
22 experience is that not only would that person not recover, but
23 that amount of tuition wouldn't be accounted for in connection
24 with an aggregate damage number submitted by plaintiffs' expert
25 at class certification.

1 **THE COURT:** Again, we're not there yet.

2 How would you overcome -- the defense is unlikely to
3 miss any valid defense. In fact, they're unlikely to miss any
4 defense, valid or not. So I'm sure they're going to raise
5 anything.

6 Well, how about the concern that -- particularly in
7 terms of one of these consumer protection, reliance or
8 reasonable reliance is to know of it; correct?

9 **MR. SHAH:** Well, there are a couple things. I think,
10 again, reliance can often be presumed in the face of certain
11 evidence. And I think that based on the allegations that we
12 have here, to the extent a statute requires reliance, that
13 we're going to be able to show that there is a presumption.

14 Other statutes that we've sued on don't have a
15 reliance requirement, so that won't be an issue if those
16 statutes are permitted to move forward.

17 And, again, broadly looking at it, if we prove our
18 allegations, we believe we'll be -- you know, that would
19 demonstrate that at the time that each of these students
20 stepped into this process, they were being faced with a rigged
21 process.

22 So we think that we can readily calculate damages, and
23 our experts can readily calculate damages based on that without
24 getting into --

25 **THE COURT:** I know you have a lot of cases, and I know

1 it's easy to talk about generalities without specifics. But
2 isn't this case rather simple in terms of damages? What do you
3 need an expert to say Mary Jones paid \$10,000 of tuition? If
4 she hadn't been misled by whatever the heck it is, she wouldn't
5 have paid anything. So her damages are \$10,000. I mean, what
6 is it that I'm missing?

7 And one of the concerns that I have is that you're not
8 focusing on this case. This is just like a generic
9 cookie-cutter case that has nothing to do with the specifics.
10 But what's the great complexity about the damage aspect of this
11 case?

12 **MR. SHAH:** Well, I don't think it is particularly
13 complex, given the theory that we have set forth.

14 I do think that Mr. Brennen would suggest that
15 certification wouldn't be appropriate under the law if I didn't
16 submit an expert report in connection with my motion for class
17 certification. That's all I'm saying.

18 **THE COURT:** All right. That's fine.

19 Recognizing that the class certification is premature,
20 is there anything else?

21 **MR. BRENNEN:** Yes, Your Honor.

22 And as you point out, it wasn't really on the plate
23 for today. But we would certainly, in the event that any of
24 these plaintiffs' claims were to survive our Motion to Dismiss,
25 we think that the next appropriate stage, given the weaknesses

1 that we have identified, would be discovery with respect to
2 those plaintiffs and an opportunity to demonstrate on summary
3 judgment that they don't have any viable claims and, therefore,
4 there isn't a viable class plaintiff.

5 One thing with respect to this damage discussion,
6 frankly, I think what counsel just described, in response to
7 the Court's question, really speaks to the fact that this is
8 not, and these types of claims could never appropriately be the
9 subject of a class action. The individual experiences are just
10 too varied, even between these three plaintiffs, in terms of,
11 you know, taking leaves of absences and et cetera.

12 But Plaintiff Goldbas is the supposed class plaintiff
13 for the eleventh cause of action or Count 11, which is
14 purportedly asserted under New York general business law,
15 Section 349. And we've cited cases to the Court in our papers,
16 one of them being Diamond versus Darden Restaurants, Inc.,
17 which is a 2014 Southern District of New York case.

18 It's well-established law in New York that if the only
19 damage that you're seeking on a claim under that statute is the
20 refund of the money that you paid for the good or service that
21 you allegedly were fraudulently induced into buying, that's not
22 sufficient damage to state a claim, so she would be out on that
23 basis for that claim, for that alone.

24 As far as, as I said, just speaks to my first point
25 about maintainability, that we don't think that it would be

1 appropriate to get into class discovery. It would be more
2 appropriate to focus on these plaintiffs to see whether they
3 actually have a viable claim on the facts once the defense have
4 an opportunity to fill in the blanks.

5 **THE COURT:** You're right about that. It's premature.
6 But, you know, we're together. And this is -- I'm
7 understanding this is a preliminary discussion, but I'm trying
8 to ascertain where we are.

9 First of all, Mr. Shah, is Mr. Brennen right that the
10 New York Act on which you're relying does not cover a refund,
11 not that you wouldn't have some other cause of action for a
12 refund, but it's not for refund; is that accurate?

13 **MR. SHAH:** That is most assuredly not my understanding
14 of Section 349. Under that interpretation, if someone
15 purchased a defective vacuum and were seeking a refund of the
16 defective vacuum, which would be the classic consumer fraud
17 case based on, say, a representation that it had a million
18 horsepower when it had 50 horsepower, then according to
19 Mr. Brennen, that wouldn't be recoverable under that consumer
20 protection statute. Having practiced in this area for some 15
21 years, I certainly don't have that understanding of New York's
22 Consumer Protection Law.

23 **THE COURT:** All right. Well, this is not the time to
24 debate that.

25 But also, you're also seeking a national class;

1 correct?

2 **MR. SHAH:** That's correct, Your Honor.

3 **THE COURT:** Okay. Which would mean that we would hear
4 concerns about 50 different state laws.

5 **MR. SHAH:** No. Under the national class, if that were
6 permitted to move forward under certification, all of the
7 claims of the students nationwide would be adjudicated or
8 considered under the Maryland law claims asserted in the First
9 Amended Complaint.

10 The Motion to Dismiss did not address any of the
11 choice-of-law issues. The defendant --

12 **THE COURT:** I understand. Your position would be that
13 if we end up with a certification, New York law would be
14 irrelevant. It would be Maryland law? Okay. I mean, that's
15 your position.

16 **MR. SHAH:** Yeah.

17 **THE COURT:** But it is relevant in terms of the
18 individual plaintiff's claim.

19 **MR. SHAH:** The claims under California, Illinois, and
20 New York State law were asserted in the alternative in the
21 event that the Court ultimately were to decide that Maryland
22 law doesn't apply to all of the students nationwide.

23 The Court has not been asked to reach that issue.

24 **THE COURT:** And Maryland law would apply to everything
25 for what reason, other than the fact that we're here? Because

1 the owner of Walden is based in Maryland? Is that what it is?

2 **MR. SHAH:** Among other things, the --

3 **THE COURT:** Like what other things?

4 **MR. SHAH:** Sure. Well, the allegations would be from
5 a contact standpoint that the conduct emanated from here, that
6 the schemes were developed here, those kind of allegations.

7 **MR. BRENNEN:** Your Honor --

8 **THE COURT:** Wait. Whoa. I understood that this
9 Walden was -- if it has a base, it's based in Minneapolis or
10 Minnesota; is that right? I mean, I don't --

11 **MR. BRENNEN:** That is correct, Your Honor.

12 **THE COURT:** Pardon?

13 **MR. BRENNEN:** It's headquartered in Minnesota. It's a
14 Delaware LLC.

15 **THE COURT:** I don't see in the Complaint something
16 that says something about Maryland. Again, it's premature,
17 but --

18 **MR. BRENNEN:** I would suggest, Your Honor, that
19 perhaps this case was brought here because they initially sued
20 Laureate as well, which is headquartered in Baltimore, but has
21 been -- was dismissed from the case with the Amended Complaint.

22 **THE COURT:** Bring it for a lot of reasons. Maybe they
23 like this Court, Mr. Brennen.

24 **MR. BRENNEN:** I wouldn't blame them.

25 **THE COURT:** Maybe they hope they got Judge So-and-so

1 down the hall and not me. I don't know.

2 But what's the difference?

3 Yes, Mr. Shah?

4 **MR. SHAH:** No.

5 **THE COURT:** All right. That's fine.

6 All right. Why don't we confer about where we're
7 going in chambers. Is the hearing finished?

8 **MR. BRENNEN:** Unless Your Honor has any further
9 questions.

10 **THE COURT:** No, I don't think so.

11 See you guys in a few minutes.

12 (Court adjourned 12:11 p.m.)

13
14 I, Douglas J. Zweizig, RDR, CRR, do hereby certify that
15 the foregoing is a correct transcript from the stenographic
16 record of proceedings in the above-entitled matter.

17
18 _____
/s/

19 Douglas J. Zweizig, RDR, CRR
20 Registered Diplomat Reporter
Certified Realtime Reporter
Federal Official Court Reporter

21 DATE: November 18, 2015
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